ASSESSMENT OF THE MANITOBA AND NEW BRUNSWICK REPORTS ON THE MEECH LAKE ACCORD

-- Staff Paper --

Ontario Ministry of the Attorney General

November 2, 1989

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INTRODUCTION AND SUMMARY

Since its inception in 1987, the Meech Lake Accord has been the subject of intense public scrutiny. This in itself is a marked departure from our historic practice in amending our constitution. Last month, this phase of formal public scrutiny drew to a close with the release of the reports of the New Brunswick **Select Committee on the 1987 Constitutional Accord** and the **Manitoba Task Force on Meech Lake**. The focus of activity will now shift from select committees and task forces to governments which will begin a new phase of considering how best to proceed.

This document seeks to facilitate that process through an analysis of the two most recent reports against the background of the report of Ontario's own **Select Committee on Constitutional Reform**. The Ontario Select Committee recommended passage of the Accord unaltered with consideration of related matters directed to the "second round" of negotiations. The report of the Manitoba Task Force insists on changes to the Accord as a precondition to its ratification; three of Quebec's five conditions could be eliminated (spending power, amending formula) or rendered of no effect (distinct society and fundamental characteristics) based on these proposed amendments. The New Brunswick report does not lay down preconditions. Its recommendation that the territorial element in the fundamental

characteristics clause be eliminated would diminish Quebec's distinctiveness as the "foyer principal" of French-speaking Canada.

A number of themes emerge in this assessment of the reports:

- there is broad support in principle for completing the process of patriation begun in 1982;

- it is also common ground that Canada needs to bring Quebec back into the constitutional family by addressing with care its concerns;

- it is agreed in all the reports that contrary to a concern expressed by some constitutional experts' acknowledgement of Quebec as a distinct society does not confer on Quebec new areas of legislative competence;

- there are, in addition, a significant number of areas where there is agreement on the desirability of improving the amendments agreed to in the Accord;

- there is, in the report of the Manitoba Task Force, an important difference of approach from that adopted in Ontario and New Brunswick -- it lays down, as a clear precondition to passage of the Accord, that all of its

proposed amendments must be made before the Accord can be passed;

- there are some proposals which, while cast as improvements of the Accord are simply flat denials of one of its key elements -- the Manitoba Task Force report, for example, proposes to simply drop any amendment with reference to the federal spending power;

- there are other cases -- treatment of fundamental characteristics -- where proposals cast as improvements to the Accord would in reality drain its terms of all effect.

The key findings of this assessment are as follows:

Fundamental Characteristics

Although all three reports propose that the "fundamental characteristics" clause be expanded, Manitoba would regard this amendment as a pre-condition to the passage of the Accord. Ontario and New Brunswick would ensure the protection of Charter rights by referring to the Charter as a fundamental characteristic in clause 1; Manitoba and New Brunswick would expand the scope of clause 16. New Brunswick would remove the reference in this clause to French-speaking Canadians "centred in Quebec."

Minority Language Rights

While the Ontario report recommends maintaining the status quo, The Manitoba report recommends "upholding" instead of "preserving" minority language rights. While this proposal may not in and of itself diminish linguistic rights, the Manitoba report also specifically states that the minority language rights clause cannot be used to interpret the Charter. The New Brunswick report seeks to expand the federal obligation to not only preserve but also to promote minority language rights and proposes constitutional entrenchment of bilingualism in New Brunswick.

The Distinct Society Clause

The Ontario and New Brunswick reports recommend retaining the current provisions with respect to affirming Quebec's role to preserve and promote its distinct society. The Manitoba report, however, recommends, as a precondition of passage of the Accord, that Quebec be limited to "upholding" its distinct society. Further, the Manitoba report states that the distinct society clause cannot be used to interpret the Charter.

Amending Formula

The Manitoba report, as a precondition of passage of the Accord, would narrow the proposed extension of the unanimity amending formula so as to retain Senate reform subject to the 7/50 formula. The Manitoba and New Brunswick reports would revert to

the 7/50 formula for the admission of new provinces. The Ontario report supports the compromise amending formula agreed to in the Meech Lake Accord.

Senate

All three reports agree that Senate Reform is a priority for the next round of constitutional reform and that Territorial governments should be permitted to nominate Senators under the interim arrangements provided by the Accord.

Immigration

All three reports make no changes to the Accord's provisions respecting immigration.

Aboriginals

All three reports identify the need to re-establish consultations with aboriginal groups at the level of First Ministers' Conferences; the Ontario and Manitoba reports would include reference to aboriginal peoples in an expanded fundamental characteristics clause.

Process of Constitutional Reform

All three reports identify the need for improved consultative processes in future constitutional reforms: the New Brunswick and Ontario reports recommend a legislative standing committee (which is currently a requirement in the Manitoba Assembly).

First Ministers' Conferences

All three reports agree that, when appropriate, aboriginal and territorial representatives should be present at First Ministers' Conferences; Manitoba's report alone makes this provision a precondition to ratifying the Accord. New Brunswick alone would remove the entrenched or perpetual status of the future constitutional reform agenda.

Supreme Court of Canada Appointments

All three reports recommend that territorial governments be eligible to nominate Supreme Court judges; Manitoba alone would make this provision a precondition to the ratifications of Meech. Manitoba proposes a deadlock breaking mechanism while Ontario and New Brunswick would improve the provincial selection process.

Spending Power

The Ontario and New Brunswick reports find the provisions of the Accord acceptable; the Manitoba report would require repeal of the provision as the precondition for its ratification of the Accord.

It is worth noting differences in the three reports. In Ontario and New Brunswick, hearings were held before select committees of their legislatures in accordance with their usual practice. In Ontario, this report then received virtually unanimous support in the Legislature. In New Brunswick, consideration of the report

by the Legislature has yet to take place. In Manitoba, public scrutiny was undertaken by a government-appointed task force which was not a committee of the legislature and whose membership was not limited to members of the legislature. Its recommendations are, at this writing, one step removed from formal legislative review and mandatory hearings.

MANITOBA

FUNDAMENTAL CHARACTERISTICS AND RIGHTS PROTECTION CLAUSES

Manitoba Task Force Recommendations

- Clause 1 of the Accord should be expanded to recognize the following "fundamental characteristics of Canada" in addition to those listed in s.2(1) (a) and (b) of the Accord:
    - the existence of Canada as a federal state with a distinct national identity;
    - the existence of the aboriginal peoples as a distinct and fundamental part of Canada;
    - the existence of Canada's multicultural heritage comprising many origins, creeds and cultures.
- Clause 16 of the Accord should be amended to include reference to the entire Charter of Rights and Freedoms, as follows:
    - Nothing in section 2 of the Constitution Act, 1867 affects the Canadian Charter of Rights and Freedoms...

Ontario Select Committee Recommendation

- The Select Committee recommended an amendment, following the ratification of the Accord, which would expand the "fundamental characteristics" clause to include aboriginal peoples, multicultural heritage and the Charter of Rights and Freedoms. The expanded list of "fundamental characteristics" would then better reflect the full spectrum of Canadian society.
- This expansion of the "fundamental characteristics" clause would make clause 16 redundant, so that it could be repealed.

Analysis

- The Ontario Select Committee and the Manitoba Task Force agree that the fundamental characteristics clause should be expanded to include reference to aboriginal peoples and multicultural heritage.
- In addition, the Ontario Select Committee proposed the recognition of the Charter of Rights as a fundamental characteristic of Canada. Recognition of the Charter as a

fundamental characteristic would make clause 16 redundant. Accordingly, the Ontario Select Committee rejected a solution similar to the Manitoba proposal to expand clause 16 by including the Charter of Rights. The Ontario Select Committee concluded that a positive statement of values which are fundamental to the country is preferable to the proliferation of "non-derogation" clauses in the Constitution through widening clause 16.

- A significant difference between Manitoba and Ontario is that while the Manitoba Task Force has recommended this change as a precondition to the passage of the Accord, the Ontario Select Committee concluded that these amendments could be made in a subsequent round, after the Accord is passed.

- In the case of Attorney General of Quebec v. Ford [1988] 2 S.C.R. 712, the Supreme Court of Canada recognized that the protection and enhancement of the French language in Quebec is an important government objective which may justify limitations on Charter rights. If clause 16 were amended by including the complete Charter of Rights (as recommended by Manitoba), it may mean that the courts could no longer consider the goal of promoting Quebec's distinctiveness in interpreting the Charter. If the Constitution provided that the distinct identity of Quebec could not affect the Charter, the Quebec government would be precluded from making arguments which have already been accepted by courts under the Charter as legitimate grounds for limits on Charter rights.

- In addition, Clause 1 of the Accord recognizes the presence of English-speaking Canadians in Quebec as a fundamental characteristic of Canada. If clause 16 were amended as recommended by Manitoba, it may mean that the courts could not consider this fundamental characteristic in interpreting the Charter. This could actually weaken the status of the English minority in Quebec.

- Manitoba's proposed reference to "Canada as a federal state with a distinct national identity" as a "fundamental characteristic of Canada" is a change that would have no legal effect.

NEW BRUNSWICK

FUNDAMENTAL CHARACTERISTICS AND RIGHTS PROTECTION CLAUSES

New Brunswick Select Committee Recommendations

Clause 1 of the Accord be expanded to affirm the Canadian Charter of Rights and Freedoms as a "fundamental characteristic of Canada."

Clause 16 of the Accord be amended to include reference to s.28 of the Charter of Rights and Freedoms, as follows:

- Nothing in section 2 of the Constitution Act 1867 affects Section 25, 27 or 28 of the Canadian Charter of Rights and Freedoms.

Ontario Select Committee Recommendations

- The Ontario Select Committee recommends that, following the ratification of the Meech Lake Accord, the "fundamental characteristics" clause be expanded to recognize aboriginal peoples, multicultural heritage and the Charter of Rights and Freedoms.

- The expansion of the "fundamental characteristics" clause would make clause 16 redundant, so that it should be repealed.

Analysis

- The Ontario Report, like New Brunswick's, recommends expanding the fundamental characteristics clause to include reference to the Charter of Rights and Freedoms. The Ontario Select Committee's position, however, is that this amendment should be made following the Accord's ratification.

- In addition, the Ontario Select Committee recommended expanding the fundamental characteristics clause to include aboriginal peoples and multicultural heritage. The Committee found that expanding the list of fundamental characteristics as recommended would make clause 16 redundant, so that it could be repealed. This is more appropriate than widening clause 16, as proposed by the New Brunswick Committee. The Ontario Select Committee concluded that a positive statement of values which are fundamental to the country is preferable to the proliferation of "non-derogation" clauses in the Constitution.

MANITOBA

MINORITY LANGUAGE RIGHTS

Manitoba Task Force Recommendations

The current Meech Lake provision which affirms that Parliament and the provinces "preserve" the fundamental characteristic of Canada (which is defined as linguistic duality) should be changed to affirm that Parliament and the provinces "uphold" the fundamental characteristic of Canada.

The current Meech Lake provision which affirms the role of Quebec to "preserve and promote" its distinct society should be changed to affirm the role of Quebec to "uphold" its distinct society.

Not only Parliament and the Legislatures but also the "Governments" of Canada should uphold minority language rights.

Ontario Select Committee Recommendations

- The Ontario Select Committee Report does not recommend any change to the current Meech Lake wording but does recommend that Ontario "continue to preserve and promote the rights of Franco-Ontarians."

Analysis

- The Manitoba Task Force and the Ontario Select Committee agree that the distinct society clause does not create new powers or rights nor does it create a special status for Quebec.

- In contrast to the position of the Ontario Select Committee, however, the Manitoba Task Force has proposed substantive changes to the distinct society clause. Specifically, Manitoba has recommended restricting Quebec's right to "uphold" rather than the pre-existing right to "preserve and promote" its distinct society.

- The reason given for this recommended change is that the word uphold "clearly implies that no new responsibilities or powers are being imposed or conferred upon any of the governments including Quebec." The position of the Select Committee, however, was that the distinct society clause is an interpretative clause rather than a grant of substantive rights. The Committee based this opinion on both the wording of the distinct society clause and the non-derogation clause found in section 2(4) of the Accord. It

is therefore uncertain what purpose is served by Manitoba Task Force's recommendation.

- In addition, contrary to the position of the Ontario Select Committee, the Manitoba Task Force has proposed changing the provinces' and Parliament's minority language rights obligations from preserving to upholding. This proposal, however, will not likely have any effect on the constitutional rights of linguistic minorities. It is virtually impossible to distinguish the upholding of rights from the preserving of rights. For example, legislation that increases French instruction in the Ontario education system can be seen as a measure designed to "uphold" the French language or to "preserve" the French language.

- The addition of the word "Government" does not create any new legal rights or powers.

NEW BRUNSWICK

MINORITY LANGUAGE RIGHTS

New Brunswick Select Committee Recommendations

The fundamental characteristic clause should be changed to recognize that the existence of French-speaking Canadians and English-speaking Canadians throughout Canada constitutes a fundamental characteristic of Canada.

The current Meech Lake provisions affirming the role of the provincial legislatures to "preserve" the fundamental characteristic of Canada should not be changed.

The role of Parliament, however, should be not only to "preserve" the fundamental characteristic of Canada but also to "promote" it.

The "Government of Canada," as well as Parliament, should also be required to promote the fundamental characteristic of Canada.

The Governments of New Brunswick and Canada should immediately initiate the process for the entrenchment of the principles contained in An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick, i.e. official bilingualism.

Ontario Select Committee Recommendations

- The Ontario Select Committee specifically stated that it accepted a vision of Canada where "the distinctiveness of Quebec as the foyer principal of French language and culture in Canada" is recognized.
- The Ontario Select Committee did not recommend any constitutional amendments to the "fundamental characteristic" or the "preserve and/or promote" clauses.
- The Select Committee does affirm, however, that, as a legislative matter, Ontario is committed to preserving and promoting the French language.

Analysis

- The New Brunswick Report proposal to remove the reference to French-speaking Canadians, "centred in Quebec," is inconsistent with the Ontario Select Committee's recommendations since it diminishes Quebec's distinctiveness as the "foyer principal" of French-speaking Canada.

- The New Brunswick Report proposal to maintain the current Meech Lake provisions with respect to the provinces "preserving" the fundamental characteristics of Canada is entirely consistent with the Ontario Select Committee's position.

- The Ontario Select Committee did not recommend that the federal government be required to promote the fundamental characteristic of Canada. Since the federal government is already constitutionally committed to bilingualism (e.g., ss.16-20 of the Charter of Rights) and legislatively committed to bilingualism, the proposal to add the word "promote" is not likely to have any immediate impact on the status quo.

- The New Brunswick Report recommending the eventual entrenchment of official bilingualism in that province, while not inconsistent with the Select Committee Report, represents the first provincial initiative toward full constitutional substantive minority language rights.

THE SENATE

Manitoba Task Force Recommendation

Without proposing any amendment to the Accord, the Task Force recommends that Senate reform be a top priority in future constitutional discussions and that a Manitoba committee be created to study reform options or to consider abolition if reform proves impossible.

Ontario Select Committee Recommendation

- The Select Committee recommended that until comprehensive Senate reform is achieved, the Territories should acquire powers similar to the provinces to nominate candidates for Senate vacancies. In its commentary the Select Committee recognized that Senate reform is a priority for the Western provinces.

Analysis

[See also assessment under **Amending Formula**]

- Like the Ontario Committee the Manitoba Task Force makes no proposal to amend the Accord for the purpose of Senate reform.

- The Ontario Select Committee recognized the importance of national institutions that can command the loyalty of all parts of Canada. In his testimony before the Select Committee the Attorney General stated that there was "a pressing need to insure that the upper chamber fulfills its role as an institution of federalism by representing the regions ... more effectively."

- The Ontario government has indicated its commitment to broader reform by declining to nominate Senators for current vacancies until the negotiation of more comprehensive change is under way.

- The Ontario Select Committee and Manitoba Task Force reports would agree that Senate reform is a priority for the next round of constitutional discussions and at that time the right of territorial governments to nominate senatorial candidates should be established. The Manitoba report also notes that the effectiveness of a reformed Senate within the Parliamentary system must be assessed carefully, a point made similarly by Premier Peterson.

NEW BRUNSWICK

THE SENATE

New Brunswick Select Committee Recommendation

The Territories should be entitled to nominate Senators.

Ontario Select Committee Recommendation

- The Select Committee recommends that the Territories should be granted the power to nominate candidates for the Senate and that this matter should be addressed in the next round of constitutional discussions

Analysis

[See also assessment under **Amending Formula**]

- The Ontario and New Brunswick Select Committees agree on:

  a) the importance of full efforts at Senate reform,

  b) the need to include the Territories in the interim nomination procedure,

  c) attending to these matters once the Meech Lake Accord is ratified.

MANITOBA

IMMIGRATION

Manitoba Task Force Recommendation

The Manitoba Task Force did not recommend any changes in the Accord's immigration provisions. It did, however, express certain reservations and suggested that these might be addressed through the proposed expansion of the "fundamental characteristics" clause.

The Task Force did recommend that First Ministers review every five years the provisions, agreements and allocation of proportions of immigrants in light of changing demographics.

Ontario Select Committee Recommendations

- The Ontario Select Committee accepted the Accord's provisions as being consistent with current practices.

Analysis

- The Manitoba Task Force's basic recommendation is to accept the immigration provisions. It stated, however, some concerns as to the possible erosion of the federal government's role in immigration policy under the Accord. The Manitoba Report does not acknowledge a number of significant features of the Accord related to this issue.

- The national interest is protected through the scrutiny of immigration agreements by the House of Commons and Senate as well as by the provincial legislative assembly.

- The Accord (s.95A) simply requires the federal government to negotiate in good faith with any province interested in concluding an immigration agreement. It does not require that an agreement in fact be reached nor does it dictate the terms of any such agreement.

- A province will be obliged to demonstrate its particular needs and circumstances and these will circumscribe the scope of such agreements.

- Federal immigration power remains substantial even if agreements are reached with some or all of the provinces. The Accord (s.95B(2)) specifically provides that agreements are subject to "national standards and objectives" set by an Act of Parliament. Parliament can also establish general classes of immigrants and levels of immigration and can

specify classes of individuals who are inadmissible into Canada notwithstanding any immigration agreements.

- The national character of immigration policy is further reinforced by the explicit applicability of the Charter to immigration agreements. This is particularly important with respect to mobility rights and guarantees against discrimination.

- As noted in the discussion of **Fundamental Characteristics and Rights Protection Clauses**, Manitoba's proposed reference to "Canada as a federal state with a distinct national identity" in the "fundamental characteristics" clause is a change that would have no legal effect. This should not, therefore, be linked to the acceptability of the Accord's immigration provisions.

NEW BRUNSWICK

IMMIGRATION

New Brunswick Select Committee Recommendation

The New Brunswick Committee affirmed the Accord's treatment of this issue.

Ontario Select Committee Recommendation

- The Ontario Select Committee made no recommendation and found the Accord's provisions to be consistent with current practices. It noted that agreements are subject to Parliamentary review and Charter scrutiny.

Analysis

- A greater provincial role in immigration policy was one of Quebec's key conditions for constitutional reform. The Accord balances this objective against the need for a continuing strong federal role.

MANITOBA

SUPREME COURT OF CANADA APPOINTMENTS

Manitoba Task Force Recommendations

The Territories should be allowed to nominate Supreme Court candidates.

First Ministers should review the appointment process at a future constitutional conference.

First Ministers should review the merits of a deadlock breaking mechanism. The Report recommends that a reformed Senate might be the appropriate body to break a deadlock.

Ontario Select Committee Recommendations

- The Ontario Select Committee recommended the eventual inclusion of the Territories in the nominating process for the Supreme Court of Canada judges.
- The Ontario Select Committee also recommended that the Standing Committee on the Administration of Justice examine ways to increase public and legislative participation in the nomination of federally and provincially appointed judges of all levels.
- The Ontario Select Committee did not make any recommendations concerning a deadlock breaking mechanism in the nomination process.

Analysis

- The only difference between the Manitoba Task Force and the Ontario Select Committee on the issue of Territorial nominations is that while the Manitoba Task Force has recommended this change as a precondition to the passage of Meech the Ontario Select Committee has recommended putting this proposal on the next round of constitutional discussions.
- To the extent that the Manitoba Task Force and Ontario Select Committee Reports recommend a general review of the appointment process in the future, the two Reports are consistent with each other.
- The Attorney General for Ontario stated in his submissions

to the Ontario Select Committee that he rejected having judges break the deadlock on the basis that the selection of judges is an executive function of government.

- The Attorney General also rejected any other deadlock breaking mechanism because any such mechanism reduces the provincial and federal governments' incentive to reach an agreement on an appointment.

- Under the Meech Lake Accord, the federal government has the power to break a deadlock by delaying an appointment where the nominees are not acceptable. As well, with the exception of Quebec which is constitutionally entitled to three positions (s.101C(3)), the federal government may choose a candidate from another province. While there is a convention of allocating seats on a regional basis, there is no legislative or constitutional imperative to do so.

- While the idea of a deadlock breaking mechanism may be theoretically sound, no one has yet suggested a neutral, politically acceptable arbiter. Given the absence of a body whose decisions all sides will respect, the Attorney General for Ontario has proposed enhancing the provincial bodies responsible for putting forward judicial nominations.

NEW BRUNSWICK

SUPREME COURT OF CANADA APPOINTMENTS

New Brunswick Select Committee Recommendations

The Territories should be allowed to nominate judges.

A formal appointment process should be established in each province and the Territories to reflect a broad spectrum of the society and provide federal as well as provincial contributions to the list of nominees.

The nominating Committee should include representatives from the major constituencies that are concerned with the quality of the Canadian judiciary.

The provincial advisory committees would make their recommendations to the provincial Attorneys General who would then submit a list of candidates to the Governor-General-in-Council.

Ontario Select Committee Recommendation

- The Ontario Select Committee recommended the eventual inclusion of the Territories in the nominating process for the Supreme Court of Canada judges.
- The Select Committee also recommended that the Standing Committee on the Administration of Justice examine ways to increase public and legislative participation in the nomination process.

Analysis

- The New Brunswick Select Committee's proposal with respect to territorial nominations of judges is consistent with the recommendation of the Ontario Select Committee. The Ontario Select Committee, however, recommended that this amendment take place after the passage of Meech.
- Both the Ontario and New Brunswick Select Committees have endeavoured to improve the provincial selection process rather than focus on problems which may arise if nominees are not acceptable to the federal government.
- The New Brunswick Select Committee would allow for federal participation in the provincial nominating process. This option was not considered by the Ontario Select Committee.

The New Brunswick Select Commmittee Report does not explain why it has argued for federal input into the original nominating process since the provincial Attorneys General have a veto over the final nominees.

MANITOBA

SPENDING POWER

Manitoba Task Force Recommendation

The provision on shared-cost programs in areas of exclusive provincial responsibility (s.106A) should be deleted from the Accord.

Ontario Select Committee Recommendations

- The Select Committee stated that s.106A struck a good balance between the need for provincial variations in program implementation and service delivery and the need for nation-wide base standards. It felt that many of the concerns over the section could be allayed by more clearly defining the term "national objectives." It therefore recommended that the First Ministers direct that a working definition, satisfactory to all provinces, be developed.

Analysis

- The Manitoba Task Force recommendation that the proposed s.106A be deleted is the reverse of the Ontario Select Committee position that it be retained and efforts made in the second round to clarify definitions.

- The Manitoba Task Force concluded that the clause weakens the ability of the central government to provide for the health and welfare of Canadians and that compensation encourages the provinces to opt out of national programs, thus increasing regional disparities in the provision of social services.

- In contrast, the Ontario Attorney General has noted, in his submission to the Select Committee, that s.106A has the benefit of entrenching in the Constitution the existence of a federal spending power in areas of exclusive provincial jurisdiction while setting some rules by which future negotiations over shared-cost programs can be conducted. This is likely to reduce past contention over federal spending and provincial compliance.

- Unlike the Ontario Select Committee Report, the Manitoba Task Force Report fails to note that the scope of s.106A is also quite limited. It would not affect federal payments to institutions under provincial jurisdiction or to individuals; nor would it affect programs not clearly within exclusive provincial jurisdiction, bilateral initiatives with a particular province which are tailored to the

NEW BRUNSWICK

SPENDING POWER

New Brunswick Select Committee Recommendation

The provisions contained in s.106A should be accepted on the condition that s.36 of the Constitution Act, 1982 be strictly applied.

Ontario Select Committee Recommendations

- The Ontario Select Committee felt that s.106A struck a good balance between the need for provincial variations in program implementation and service delivery and the need for nation-wide base standards. It felt that many of the concerns over the section could be allayed by more clearly defining the term "national objectives." It therefore recommended that the First Ministers direct that a working definition, satisfactory to all provinces, be developed.

Analysis

- The reports of the New Brunswick and Ontario Select Committees agree that s.106A can be adopted as drafted.
- The New Brunswick proposal for a strict application of s.36 of the Constitution would not require any further constitutional change.

specific needs of that province, and recourse to tax expenditures and tax credits to pursue federal objectives.

- The Manitoba Task Force is of the opinion that the current situation with respect to the federal spending power comes closer than the Accord to achieving the balance between national leadership and provincial flexibility which is essential to the successful operation of social programs. However, it does not take into account that s.106A simply constitutionalizes that which is already established practice. The 1969 federal government White Paper, Federal-Provincial Grants and the Spending Power of Parliament, recommended two principles for future national shared-cost programs within exclusive provincial jurisdiction: that these should not be undertaken until there existed "a broad national consensus in favour of the programme" and that each province should have the right not to participate without "fiscal penalty." Though these principles were never formally adopted, no program which would violate them has since been suggested.

- The Task Force Report does not consider that whatever threats to future national programs may exist could be removed by making the language of the provision more specific in subsequent discussions, as suggested by the Ontario Select Committee.

- The blanket rejection of the spending power provision by the Manitoba Task Force is not accompanied by an assessment of the impact on Quebec. Quebec's agreement to s.106A represents the declaration of a truce in its longstanding opposition to the principle of a federal spending power. By rejecting one of Quebec's original five points for adherence to the Constitution Act, 1982, the Report does not acknowledge the compromise made by Quebec to accept s.106A even in its current form.

MANITOBA

FIRST MINISTERS' CONFERENCES

Manitoba Task Force Recommendations

Add aboriginal rights to the annual First Ministers' Conference agenda and invite aboriginal representatives.

Invite territorial representatives to participate in any conference where an agenda item directly affects them.

Ontario Select Committee Recommendation

- Select Committee Recommendation #10 proposed a constitutional amendment, following the Accord's ratification, entrenching First Ministers' Conferences on aboriginal rights to be convened at least once every five years.

- The proposed amendment also provided for participation in these First Ministers' Conferences by aboriginal representatives and by territorial representatives when their interests are affected.

Analysis

- There is common ground between the two reports concerning the desirability of future First Ministers' Conferences on the subject of aboriginal rights.

- Both reports also recommend that representatives of the aboriginal peoples be invited to participate in these conferences.

- The Manitoba Task Force adopted exactly the Ontario Select Committee's proposed amendment directing that elected representatives of the governments of the Yukon Territory and Northwest Territories be invited to conferences where agenda items directly affect them.

- The fundamental difference is that the Manitoba Task Force would make the entrenching of these recommendations a precondition to ratifying the Accord. In contrast, the Ontario Select Committee concluded that they could be appropriately dealt with subsequent to the ratification of the Accord.

NEW BRUNSWICK

FIRST MINISTERS' CONFERENCES

New Brunswick Select Committee Recommendation

Amend the Accord to delete all references to specific agenda items for conferences. The Committee also suggests that fisheries, aboriginal rights and Senate reform become priorities in constitutional discussions and that territorial and aboriginal representatives be invited where their interests are affected.

Ontario Select Committee Recommendation

- The Ontario Select Committee proposed an amendment subsequent to the Accord's ratification to provide for the representation of aboriginal peoples and the Yukon and Northwest Territories governments at conferences where their interests are discussed. It did not comment on the principle of entrenching specific agenda items.

Analysis

- The Ontario Select Committee agrees with the New Brunswick Select Committee's general concern regarding aboriginal and territorial representation at First Ministers' Conferences but takes the position that this issue should be addressed after the Accord is ratified.

- While recognizing the New Brunswick Select Committee's concern with entrenched agenda items, especially fisheries, it should be noted that other provinces may attach some importance to this formal commitment that their concerns will be considered in future constitutional discussions.

MANITOBA

AMENDING FORMULA

Manitoba Task Force Recommendation

Constitutional amendments relating to the Senate and the creation of new provinces should be made pursuant to the 7 provinces/50 per cent rule as provided in the current Constitution.

Ontario Select Committee Recommendation

- The Select Committee on Constitutional Reform made no recommendations with respect to the proposed amending formula, but found that most witnesses agreed that the key institutions of federalism should be amended only with the unanimous consent of the provinces and the federal government.

Analysis

- In the Meech Lake Accord, six types of constitutional amendments currently requiring the consent of 7 provinces/50 percent of the population would require unanimous provincial consent. Manitoba does not object to the unanimity requirement except in relation to two of these amendments: Senate reform and the establishment of new provinces.

- In his testimony to the Ontario Select Committee the Attorney General noted that the distinctive requirement of unanimity for amendments to the list of matters in the proposed Section 41 exists because these matters are fundamental to the structure and operation of our federal state and could be said to represent the essential terms upon which the 10 provinces are joined together in Confederation. The proposed amendments reflect the conviction of the First Ministers that changes to the essential structure and institutions of federalism without the support of any one province could undermine the legitimacy of Canada's Constitution.

- The unanimity requirement is intended to reconcile competing views about the principles which should be reflected in the constitutional amending formula. Quebec has expressed concern about its position following the Supreme Court of Canada decisions in the early 1980's.

- However, certain provincial governments have taken the position that all provinces should be equal under the amending formula. This principle of equality among provinces, established in 1982, led to the proposition that if there were to be a right to reject amendments, it had to be given to all provinces. However, this latter position raised a further concern about excessive rigidity in the amending formula, particularly if the full range of constitutional amendments were to require unanimous approval.

- Thus the compromise reached at Meech Lake was to require unanimity for the limited list of matters in Section 42 which relate to the structure and central institutions of federalism. To avoid excessive rigidity, amendment of the Constitution in respect of most other matters was left within the terms of the general formula.

- Prior to 1982, new provinces could be unilaterally established by the federal government without the approval of any of the provinces. In recognition of the significant fiscal and political implications of any such alteration in the balance of federalism, it was provided in the Constitution Act, 1982 that the establishment of new provinces would be subject to the general amending formula, which requires the agreement of seven provinces representing fifty per cent of the population.

- Under the general formula, it would not be possible to establish new provinces without the consent of at least seven provinces. It is not expected that the provisions for unanimity will diminish the likelihood of future provincehood for the northern Territories.

- However, it should be emphasized that unanimity will not be necessary for the great majority of amendments that are likely to be made in the future. Only amendments which affect the limited list of matters relating to the structure and central institutions of federalism are included in the proposed Section 41, while other amendments will remain subject to the general formula.

NEW BRUNSWICK

AMENDING FORMULA

New Brunswick Select Committee Recommendation

Constitutional amendments relating to the creation of new provinces should be made pursuant to the 7 provinces/50 per cent rule as provided in the current Constitution.

Territories should be consulted in the creation of new provinces.

Ontario Select Committee Recommendations

- The Select Committee on Constitutional Reform made no recommendations with respect to the proposed amending formula, but found that most witnesses agreed that the key institutions of federalism should be amended only with the unanimous consent of the provinces and the federal government.

Analysis

- Prior to 1982, new provinces could be unilaterally established by the federal government without the approval of the provinces. In recognition of the significant fiscal and political implications of any such alteration in the balance of federalism, it was provided in the Constitution Act, 1982 that the establishment of new provinces would be subject to the general amending formula, which requires the agreement of seven provinces representing fifty per cent of the population.

- The submission of the Attorney General to the Ontario Select Committee suggests that the Accord's amending formula is appropriate for Canadian federalism. The unanimity requirement is consistent with the principle that fundamental changes to the institutions and basic structures of federalism should be made only with the unanimous consent of the provinces and the federal government. Furthermore, as a practical matter, it does not significantly diminish the likelihood of the Territories achieving provincial status.

- Although it may be desirable to have a mechanism to consult with territorial representatives regarding the creation of new provinces, such a mechanism should not be entrenched in the Constitution. Until the Territories are admitted as provinces, territorial governments do not have

constitutional status. Territorial governments exercise delegated powers only and are established by federal legislation. Bodies without constitutional status should not have a formal say in amending the Constitution.

MANITOBA

ABORIGINAL RIGHTS

Manitoba Task Force Recommendations

Manitoba recommends the inclusion of a reference to aboriginal peoples in the section describing the fundamental characteristics of Canada.

Manitoba recommends that aboriginal rights be put on the constitutional reform agenda at annual First Ministers' Conferences until resolved.

Ontario Select Committee Recommendations

- The Select Committee recommends [#9] that following the ratification of the Accord, consideration should be given to amending the Constitution to include aboriginal people, among others, as a fundamental characteristic of Canada.

- As well, the Select Committee recommends [#3] that the new Standing Committee on Constitutional and Intergovernmental Affairs study a number of issues including aboriginal rights and place these on the agenda of future First Ministers' Conferences.

- The Select Committee also recommends [#10] that following the ratification of the Accord, the Constitution be amended to mandate the holding of a First Ministers' Conference at least once every five years to deal with the identification and definition of aboriginal rights and other aboriginal issues. The first conference is to be held within one year of the passage of the amendment.

Analysis

- The Manitoba and Ontario reports agree that the "fundamental characteristics" clause be amended to make reference to aboriginal peoples and that the subject of aboriginal rights be returned to First Ministers' Conference discussions.

- While the Manitoba report would require this amendment as a precondition to the passage of the Accord, the Select Committee considered it appropriate that it be addressed in the second round.

- Manitoba would propose an annual First Ministers' Conference and Ontario a quinquennial First Ministers' Conference to deal with aboriginal issues.

- It should be recognized that the further constitutionalization of aboriginal rights will be facilitated by successful initiatives which do not require constitutional change.

- Ontario is already committed to the identification and definition of aboriginal rights, and in particular the aboriginal right of self-government. Cabinet has approved promoting the negotiation of self-government. The Province is negotiating this issue with the Nishnawbe-Aski Nation pursuant to a Declaration of Political Intent with First Nations. A number of other aboriginal initiatives are currently under way.

- Constitutional reform will be possible only with the active participation of Quebec. Its lack of participation was a contributing factor in the failure of the 1982-87 discussions to produce a constitutional amendment on aboriginal self-government.

NEW BRUNSWICK

ABORIGINAL RIGHTS

New Brunswick Select Committee Recommendations

The New Brunswick Select Committee recommends that aboriginal issues be dealt with at future constitutional conferences.

Ontario Select Committee Recommendations

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Analysis

- The Ontario and New Brunswick reports are on common ground on the need to return to constitutional discussions of aboriginal issues in the second round.

MANITOBA

THE PROCESS OF CONSTITUTIONAL REFORM

Manitoba Task Force Recommendation

Federal and provincial governments should hold public hearings after First Ministers develop proposals for constitutional change and before they sign them. The federal government should hold public hearings on such proposals in provinces that choose not to do so.

Ontario Select Committee Recommendation

- The Select Committee recommended that the Ontario Legislature should establish a standing legislative committee on constitutional affairs, to ensure Ontarians can make timely input into future constitutional change.

Analysis

- The Ontario Select committee did not reach the conclusion of the Manitoba Task Force that the legitimacy of the 1987 Accord was undercut by defects in the process by which it was achieved.

- The Ontario Select Committee concluded that the Accord broke no new substantive ground. The issues addressed in that Accord had been on Canada's public constitutional agenda since the 1960s. Both federal and Quebec government positions on constitutional reconciliation were already well known. Moreover, the Accord was able to address issues other than those raised by Quebec.

- As the Attorney General said in his May 4, 1988 submission to the Select Committee, the process was consonant with the existing traditions and expectations for achieving constitutional change; it fell within the accepted limits of executive federalism and was consistent with the practice of responsible parliamentary government. This was the first time Canada's legislatures have debated substantial constitutional changes after the First Ministers have approved them.

- Like the Manitoba Task Force, the Ontario Select Committee concluded that the process used in 1987 would not be appropriate for use in subsequent constitutional negotiations. The public had come to expect more frequent and more meaningful opportunities to participate in the work

NEW BRUNSWICK

THE PROCESS OF CONSTITUTIONAL REFORM

New Brunswick Select Committee Recommendations

Parliament and the legislative assemblies should study and react to First Ministers' constitutional proposals before the executive makes any definite commitments.

The New Brunswick legislature should establish a standing committee on constitutional affairs to consult and advise the executive both before and after First Ministers' constitutional conferences.

The New Brunswick government should urge Parliament and the other provincial legislatures to establish similar committees.

Ontario Select Committee Recommendations

- The Select Committee recommended that the Ontario Legislature should establish a standing legislative committee on constitutional affairs, to ensure Ontarians can make timely input into future constitutional change.

Analysis

- The New Brunswick Select Committee report agrees with the Ontario Select Committee that shortcomings in the 1987 Accord process did not fundamentally undercut the legitimacy of that reform.

- However, like the New Brunswick Select Committee, Ontario's Committee identified several features of the constitutional reform process that would require attention in subsequent rounds; the committees identified a broad consensus that there needs to be a more open and timely process to ensure wide popular support for future proposed changes. At the same time it was recognized that no new process can be a lasting improvement unless it permits eleven governments to negotiate executive agreement on such fundamental matters.

- In his response to the report of the Ontario Select Committee, the Premier indicated that he would place the matter before the First Ministers at their next formal discussion of constitutional reform. In addition he proposed that a standing legislative committee on constitutional arrangements be established, and that the Legislature hold an annual "state of the federation" debate. Further, he indicated Ontario would support a public nongovernmental conference on the process of constitutional reform.

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